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CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
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DEPUTY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

ALLEN JAMES BRADLEY,
CDCR #K-27398,

Plaintiff,

vs.

DR. SIMON JAMESON;
REGISTERED NURSE SALGADO;
DR. FRANCO A. FELIZARTA;
CALIFORNIA DEP'T OF
CORRECTIONS AND
REHABILITATION,

Defendants.

Civil No. 13cv2572 BEN (WMC)

ORDER:

**(1) GRANTING MOTION TO
PROCEED *IN FORMA PAUPERIS*
(ECF No. 2)**

AND

**(2) DISMISSING COMPLAINT
FOR FAILING TO STATE A
CLAIM PURSUANT TO
28 U.S.C. §§ 1915(e)(2) & 1915A(b)**

Allen James Bradley ("Plaintiff"), a state prisoner proceeding pro se and currently incarcerated at California State Prison—Los Angeles County, has filed a civil rights action pursuant to 42 U.S.C. § 1983. (ECF No. 1.) Plaintiff alleges his constitutional rights were violated when he was previously housed in Calipatria State Prison ("CAL"). In addition, Plaintiff has filed a Motion to Proceed *In Forma Pauperis* ("IFP"). (ECF No. 2.)

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I. MOTION TO PROCEED IFP

All parties instituting any civil action, suit or proceeding in a district court of the United States, except an application for writ of habeas corpus, must pay a filing fee of \$350. *See* 28 U.S.C. § 1914(a). An action may proceed despite a plaintiff's failure to prepay the entire fee only if the plaintiff is granted leave to proceed IFP pursuant to 28 U.S.C. § 1915(a). *See Rodriguez v. Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999). However, "[u]nlike other indigent litigants, prisoners proceeding IFP must pay the full amount of filing fees in civil actions and appeals pursuant to the PLRA [Prison Litigation Reform Act]." *Agyeman v. INS*, 296 F.3d 871, 886 (9th Cir. 2002). As defined by the PLRA, a "prisoner" is "any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program." 28 U.S.C. § 1915(h). Because Plaintiff is currently incarcerated, he is a prisoner as defined by 28 U.S.C. § 1915(h), and therefore subject to the PLRA's requirements and limitations. *Ageyman*, 296 F.3d at 886.

Under 28 U.S.C. § 1915, as amended by the PLRA, a prisoner seeking leave to proceed IFP must submit a "certified copy of the trust fund account statement (or institutional equivalent) for the prisoner for the six-month period immediately preceding the filing of the complaint." 28 U.S.C. § 1915(a)(2); *Andrews v. King*, 398 F.3d 1113, 1119 (9th Cir. 2005). From the certified trust account statement, the Court must assess an initial payment of 20% of (a) the average monthly deposits in the account for the past six months, or (b) the average monthly balance in the account for the past six months, whichever is greater, unless the prisoner has no assets. *See* 28 U.S.C. § 1915(b)(1); 28 U.S.C. § 1915(b)(4). The institution having custody of the prisoner must collect subsequent payments, assessed at 20% of the preceding month's income, in any month in which the prisoner's account exceeds \$10, and forward those payments to the Court until the entire filing fee is paid. *See* 28 U.S.C. § 1915(b)(2).

Plaintiff has submitted a certified copy of his trust account statement pursuant to 28 U.S.C. § 1915(a)(2) and S.D. CAL. CIVLR 3.2. *Andrews*, 398 F.3d at 1119. The trust account statement shows that Plaintiff has no currently available funds with which he could satisfy any initial partial filing fee. *See* 28 U.S.C. § 1915(b)(4) (providing that “[i]n no event shall a prisoner be prohibited from bringing a civil action or appealing a civil action or criminal judgment for the reason that the prisoner has no assets and no means by which to pay [an] initial partial filing fee”); *Taylor*, 281 F.3d at 850 (finding that 28 U.S.C. § 1915(b)(4) acts as a “safety-valve” preventing dismissal of a prisoner’s IFP case based solely on a “failure to pay . . . due to the lack of funds available”).

Therefore, the Court **GRANTS** Plaintiff’s Motion to Proceed IFP (ECF No. 2), and assesses no initial partial filing fee per 28 U.S.C. § 1915(b)(1). However, the entire \$350 balance of the filing fees mandated shall be collected and forwarded to the Clerk of the Court pursuant to the installment payment provisions set forth in 28 U.S.C. § 1915(b)(1).

II. SUA SPONTE SCREENING PER 28 U.S.C. § 1915(e)(2) AND § 1915A

The PLRA also obligates the Court to review complaints filed by all persons proceeding IFP and by those, like Plaintiff, who are “incarcerated or detained in any facility [and] accused of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms or conditions of parole, probation, pretrial release, or diversionary program,” “as soon as practicable after docketing.” *See* 28 U.S.C. §§ 1915(e)(2) & 1915A(b). Under these provisions of the PLRA, the Court must sua sponte dismiss complaints, or any portions thereof, which are frivolous, malicious, fail to state a claim, or which seek damages from defendants who are immune. *See* 28 U.S.C. §§ 1915(e)(2)(B) & 1915A; *Lopez v. Smith*, 203 F.3d 1122, 1126-27 (9th Cir. 2000) (en banc) (§ 1915(e)(2)); *Rhodes v. Robinson*, 621 F.3d 1002, 1004 (9th Cir. 2010) (discussing 28 U.S.C. § 1915A(b)).

“[W]hen determining whether a complaint states a claim, a court must accept as true all allegations of material fact and must construe those facts in the light most

favorable to the plaintiff.” *Resnick v. Hayes*, 213 F.3d 443, 447 (9th Cir. 2000); *see also* *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998) (noting that § 1915(e)(2) “parallels the language of Federal Rule of Civil Procedure 12(b)(6)”). In addition, courts “have an obligation where the petitioner is pro se, particularly in civil rights cases, to construe the pleadings liberally and to afford the petitioner the benefit of any doubt.” *Hebbe v. Pliler*, 627 F.3d 338, 342 & n.7 (9th Cir. 2010) (citing *Bretz v. Kelman*, 773 F.2d 1026, 1027 n.1 (9th Cir. 1985)). The court may not, however, “supply essential elements of claims that were not initially pled.” *Ivey v. Bd. of Regents of the Univ. of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982). “Vague and conclusory allegations of official participation in civil rights violations are not sufficient to withstand a motion to dismiss.” *Id.*

A. Statute of Limitations

Plaintiff alleges that Defendant Simon failed to provide him with adequate medical care for his diagnosis of valley fever when he was examined by Defendant Simon on December 11, 2007 and September 24, 2008. (*See* Compl. at 3-4.) Where the running of the statute of limitations is apparent on the face of the complaint, dismissal for failure to state a claim is proper. *See Cervantes v. City of San Diego*, 5 F.3d 1273, 1276 (9th Cir. 1993). Because section 1983 contains no specific statute of limitations, federal courts apply the forum state’s statute of limitations for personal injury actions. *Jones v. Blanas*, 393 F.3d 918, 927 (9th Cir. 2004); *Maldonado v. Harris*, 370 F.3d 945, 954 (9th Cir. 2004); *Fink v. Shedler*, 192 F.3d 911, 914 (9th Cir. 1999). Before 2003, California’s statute of limitations was one year. *Jones*, 393 F.3d at 927. Effective January 1, 2003, the limitations period was extended to two years. *Id.* (citing CAL. CODE CIV. PROC. § 335.1).

Unlike the length of the limitations period, however, “the accrual date of a § 1983 cause of action is a question of federal law that is not resolved by reference to state law.” *Wallace v. Kato*, 549 U.S. 384, 388 (2007); *Hardin v. Staub*, 490 U.S. 536, 543-44 (1989) (federal law governs when a § 1983 cause of action accrues). “Under the

1 traditional rule of accrual . . . the tort cause of action accrues, and the statute of limitation
2 begins to run, when the wrongful act or omission results in damages.” *Wallace*, 549 U.S.
3 at 391; *see also Maldonado*, 370 F.3d at 955 (“Under federal law, a claim accrues when
4 the plaintiff knows or has reason to know of the injury which is the basis of the action.”).

5 Here, Plaintiff seeks to hold Defendant Simon liable for events which occurred
6 between 2007 and 2008. Thus, Plaintiff would have reason to believe that his
7 constitutional rights were violated five to six years ago. *See Wallace*, 549 U.S. at 391;
8 *see also Maldonado*, 370 F.3d at 955. However, Plaintiff did not file his Complaint in
9 this case until October 23, 2013, which exceeds California’s statute of limitations. *See*
10 CAL. CODE CIV. PROC. § 335.1; *Jones*, 393 F.3d at 927. Plaintiff does not allege any facts
11 to suggest how or why California’s two-year statute of limitations might be tolled for
12 a period of time which would make his claims timely. *See, e.g., CAL. CODE CIV. PROC.*
13 *§ 352.1* (tolling statute of limitations “for a maximum of 2 years” during a prisoner’s
14 incarceration); *Fink v. Shedler*, 192 F.3d 911, 916 (9th Cir. 1999) (finding that CAL.
15 CODE CIV. PROC. § 352.1 tolls a California prisoner’s personal injury claims accruing
16 before January 1, 1995 for two years, or until January 1, 1995, whichever occurs later,
17 unless application of the statute would result in a “manifest injustice”).

18 Pursuant to *Fink*, a portion of Plaintiff’s claims against Defendants, accruing in
19 2007 and 2008, would be tolled for two years. California’s two-year statute of limitations
20 would then begin to run—requiring Plaintiff to file this action against these Defendants
21 no later than 2011 or 2012. Generally, federal courts also apply the forum state’s law
22 regarding equitable tolling. *Fink*, 192 F.3d at 914; *Bacon v. City of Los Angeles*, 843
23 F.2d 372, 374 (9th Cir. 1988). Under California law, however, a plaintiff must meet
24 three conditions to equitably toll a statute of limitations: (1) he must have diligently
25 pursued his claim; (2) his situation must be the product of forces beyond his control; and
26 (3) the defendants must not be prejudiced by the application of equitable tolling. *See*
27 *Hull v. Cent. Pathology Serv. Med. Clinic*, 28 Cal. App. 4th 1328, 1335 (1994); *Addison*
28 *v. State*, 21 Cal.3d 313, 316-17 (1978); *Fink*, 192 F.3d at 916. Here, however, Plaintiff

1 has failed to plead any facts which, if proved, would support the equitable tolling of his
 2 claims. *See Cervantes v. City of San Diego*, 5 F.3d 1273, 1277 (9th Cir. 1993). Thus,
 3 Plaintiff's claims against Defendants arising in 2007 and 2008 must be dismissed
 4 pursuant to 28 U.S.C. § 1915(e)(2) because it appears from the face of the pleading that
 5 Plaintiff's claims are time-barred. *Id.*

6 **B. Eighth Amendment medical care claims**

7 The Court also finds that Plaintiff's Complaint is subject to sua sponte dismissal
 8 pursuant to 28 U.S.C. § 1915(e)(2) because it fails to adequately state an Eighth
 9 Amendment claim. Plaintiff alleges that Defendants were deliberately indifferent to his
 10 serious medical needs in violation of his Eighth Amendment rights. Where an inmate's
 11 claim is one of inadequate medical care, the inmate must allege "acts or omissions
 12 sufficiently harmful to evidence deliberate indifference to serious medical needs."
 13 *Estelle v. Gamble*, 429 U.S. 97, 106 (1976). Such a claim has two elements: "the
 14 seriousness of the prisoner's medical need and the nature of the defendant's response to
 15 that need." *McGuckin v. Smith*, 974 F.2d 1050, 1059 (9th Cir. 1991), *overruled on other*
 16 *grounds by WMX Techs., Inc. v. Miller*, 104 F.3d 1133, 1136 (9th Cir. 1997). A medical
 17 need is serious "if the failure to treat the prisoner's condition could result in further
 18 significant injury or the 'unnecessary and wanton infliction of pain.'" *Id.* (quoting
 19 *Estelle*, 429 U.S. at 104). Indications of a serious medical need include "the presence of
 20 a medical condition that significantly affects an individual's daily activities." *Id.* at
 21 1059-60. By establishing the existence of a serious medical need, an inmate satisfies the
 22 objective requirement for proving an Eighth Amendment violation. *Farmer v. Brennan*,
 23 511 U.S. 825, 834 (1994).

24 In general, deliberate indifference may be shown when prison officials deny,
 25 delay, or intentionally interfere with a prescribed course of medical treatment, or it may
 26 be shown by the way in which prison medical officials provide necessary care.
 27 *Hutchinson v. United States*, 838 F.2d 390, 393-94 (9th Cir. 1988).

While Plaintiff has demonstrated that he has serious medical needs, throughout his Complaint he sets forth allegations that he was routinely provided medical care and medication for his medical needs. Plaintiff alleges that Defendant Simon recommended treatment that other doctors later disagreed with. (*See* Compl. at 4.) As to Defendant Felizarta, Plaintiff also alleges that he recommended treatment in the form of surgery but a different doctor later discouraged Plaintiff from having the surgery due to the risk of complications. (*Id.* at 7.) A mere difference of opinion between an inmate and prison medical personnel regarding appropriate medical diagnosis and treatment is not enough to establish a deliberate indifference claim. *Sanchez v. Vild*, 891 F.2d 240, 242 (9th Cir. 1989).

Moreover, “[b]efore it can be said that a prisoner’s civil rights have been abridged, however, the indifference to his medical needs must be substantial.” *Broughton v. Cutter Labs.*, 622 F.2d 458, 460 (9th Cir. 1980). While Plaintiff alleges that the treatment recommended by Defendant Simon would have caused him more harm, it appears from Plaintiff’s allegations that the recommendations of Defendant Simon were not followed. Mere ‘indifference,’ ‘negligence,’ or ‘medical malpractice’ will not support this cause of action.” *Id.* (citing *Estelle*, 429 U.S. at 105-06); *see also Toguchi v. Chung*, 391 F.3d 1051, 1060 (9th Cir. 2004).

Thus, Plaintiff’s Eighth Amendment inadequate medical care claims are dismissed for failing to state a claim upon which relief can be granted.

C. Eleventh Amendment

Finally, to the extent Plaintiff names the California Department of Corrections and Rehabilitation as a Defendant, his claims must be dismissed sua sponte pursuant to both 28 U.S.C. § 1915(e)(2) and § 1915A(b) for both failing to state a claim and for seeking damages against a defendant who is immune. The State of California’s Department of Corrections and Rehabilitation (“CDCR”), is not a “person” subject to suit under § 1983. *Hale v. Arizona*, 993 F.2d 1387, 1398-99 (9th Cir. 1993) (holding that a state department

1 of corrections is an arm of the state, and thus, not a “person” within the meaning of
2 § 1983).

3 **III. CONCLUSION AND ORDER**

4 1. Plaintiff’s Motion to proceed IFP pursuant to 28 U.S.C. § 1915(a) (ECF No.
5 2) is **GRANTED**.

6 2. The Secretary of California Department of Corrections and Rehabilitation,
7 or his designee, shall collect from Plaintiff’s prison trust account the \$350 balance of the
8 filing fee owed in this case by collecting monthly payments from the account in an
9 amount equal to twenty percent (20%) of the preceding month’s income and forward
10 payments to the Clerk of the Court each time the amount in the account exceeds \$10 in
11 accordance with 28 U.S.C. § 1915(b)(2). **ALL PAYMENTS SHALL BE CLEARLY**
12 **IDENTIFIED BY THE NAME AND NUMBER ASSIGNED TO THIS ACTION.**

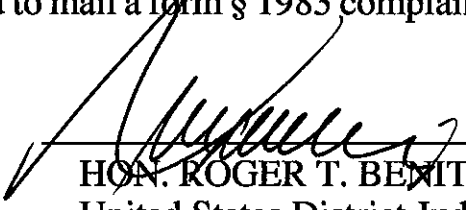
13 3. The Clerk of the Court is directed to serve a copy of this Order on Jeffrey
14 Beard, Secretary, California Department of Corrections and Rehabilitation, 1515 S
15 Street, Suite 502, Sacramento, California 95814.

16 **IT IS FURTHER ORDERED** that:

17 4. Plaintiff’s Complaint is **DISMISSED** for failing to state a claim upon which
18 relief may be granted pursuant to 28 U.S.C. § 1915(e)(2)(B) and § 1915A(b). However,
19 Plaintiff is **GRANTED** forty-five (45) days leave from the date this Order is “Filed” in
20 which to file a First Amended Complaint which cures all the deficiencies of pleading
21 noted above. Plaintiff’s Amended Complaint must be complete in itself without
22 reference to the superseded pleading. *See* S.D. CAL. CIV. L. R. 15.1. Defendants not
23 named and all claims not re-alleged in the Amended Complaint will be deemed to have
24 been waived. *See King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987). Further, if
25 Plaintiff’s Amended Complaint fails to state a claim upon which relief may be granted,
26 it may be dismissed without further leave to amend and may hereafter be counted as
27 a “strike” under 28 U.S.C. § 1915(g). *See McHenry v. Renne*, 84 F.3d 1172, 1177-79
28 (9th Cir. 1996).

5. The Clerk of Court is directed to mail a form § 1983 complaint to Plaintiff.

DATED: 12/09/13


HON. ROGER T. BENITEZ
United States District Judge